Gary A. Ledford
11401 Apple Valley Road
Apple Valley, California 92308
(760)-240-1111
Fax (760)-240-3609

In Pro per

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

| | | |
|---|---|---|
| In the Matter of: | ) | Docket No. 97-AFC-1 |
| | ) | |
| | ) | |
| The Application for Certification | ) | |
| For the High Desert Power Project [HDPP] | ) | |
| | ) | |
| _____ | ) | |

## To the Victor Valley Water District Board of Directors and the Mojave Water Agency and Water Master Board of Directors:

# POSITION ON THE AQUIFER STORAGE AND RECOVERY AGREEMENT AND THE CONSUMPTIVE USE ISSUE OF 2 TO 1 FOR THE HIGH DESERT POWER PROJECT

Respectfully submitted:

September 21, 1999

_____
GARY A. LEDFORD
PARTY IN INTERVENTION
IN PRO PER

# POSITION OF GARY A LEDFORD ON VICTOR VALLEY WATER DISTRICT'S PROPOSED AQUIFER STORAGE AGREEMENT AND THE CONSUMPTIVE USE OF WATER AND THE REQUIREMENT THAT 100% CONSUMPTIVE USE OF ANY "NEW" USER REQUIRES "REPLACEMENT" WATER ON A 2 FOR 1 REPLACEMENT FACTOR TO ASSIST IN THE CURE OF THE OVERDRAFT

The Victor Valley Water District is proposing that the Board of Directors **"Authorize an Agreement",** including finalization of **"Exhibits",** one of which purports to be a "Will Serve Letter", to provide a continuous un-interruptable source of water for the High Desert Power Project.

**THE PROPOSED PROJECT CANNOT BE ACTED UPON OR RELIED UPON AT THE PRESENT TIME FOR THE FOLLOWING REASONS:**

1. The "Project" that is currently proposed requires the completion of "**CEQA",** before it can be acted upon. No CEQA document or process is before this Board.

2. An Aquifer Storage Agreement requires a **"Storage Agreement"**, with the Mojave Water Agency, which has heretofore never been entered into. The MWA must also conduct a CEQA Process on any such Storage Agreement.

3. The MWA Storage Agreement is subject to all of the conditions of the Adjudication, one of which is Replacement water and Return Flows, which were designed by the Judgment to bring the basin into balance. This Storage Agreement does not bring the basin in balance.

4. The "Cost" to the District will be substantially more than $210,000 and the undertaking of the Project at this time with no guarantee that a Power Project will be built is not in the interest of the "Rate Payers".

5. The "**Project",** belongs to VVEDA, the property is being leased to HDPP.

6. The Project is the subject of a CEQA lawsuit settlement between MWA and VVEDA that mandates that an EIR be prepared for all new Projects at George Air Base. No such EIR has been prepared.

7. SWP Water is only available on a year to year basis and is subject to interruption, termination and cut back.

8. The agreement itself directly states that "the Project has the potential to have a direct impact on the District's water source of supply, if not adequately and appropriately conditioned to mitigate any potential adverse impacts." The District cannot use an agreement as a substitute for CEQA.

9. The Agreement attempts to use an "End Run" around CEQA, by incorporating them into the CEC Process. The Cart is before the horse for the following reasons:

   a. The Project proposes to do more in the form of CEQA than what is proposed for the HDPP, in that it proposes to create a project of seven new wells that the District can use **for its own use.** [This is not before the Energy commission and not studied].

   b. The condemnation of well sites for underground storage of water is not studies as a part of the CEQA process.

   c. The injection of 4,000 acre-feet is partly studied, but the use of 8,000 acre-feet of SWP Water during the first five years is not.

   d. The possible injection of water for the Water District's use is not addressed.

   e. The issue on the 2 for 1 Replacement is not addressed.

   f. The Settlement Agreement with MWA and VVEDA is not addressed.

   g. The potential for "another water source", paragraph 14, is not addressed by the CEC.

   h. The district use of the Project Wells and Pipelines are not addressed by the CEC.

   i. Water level changes are expected, par 21. CEC has not considered this as a possibility.

   j. This list at present is not intended to be all-inclusive.

Beyond the CEQA issues the District must look at the agreement, which is not a traditional will serve letter; it creates contractual rights and obligations. The HDPP has the right to receive water on terms and conditions better than any of your other customers and better than what is allowed under Ordinance 9 of the MWA. This should give grave concern to the Board Members and its ratepayers for the following reasons:

1. The term of the "Project" is for 80 years par 27.1, that is a long time, and a lot will happen in the water supply business over that period that cannot be contemplated presently. What is the District getting?

2. Look closely at par. 40 "Specific Performance", at all times after the execution of the Agreement HDPP's position will be that the District has the direct obligation to Supply 4,000 acre-feet of water annually to its Project and that it will sue the district if it cannot get the water under whatever it deems the terms of this agreement. If the Power Plant is "Off Line", the Plant will sustain serious financial damage that it will recover from the District under this agreement. What other customer has this recourse?

3. The District has no control over the Water Treatment Facilities, and is subject to paying for water treated at no fixed rate.

4. Mr. Mc Guire is the attorney for the City of Victorville and has a direct conflict of interest as it relates to this "Project"

The issues under the Adjudication are not settled and the California Supreme Court may make changes that could make any number of the issues under this proposed agreement untenable. The idea to "negotiate" those issues at a later date subjects the district to further litigation.

While the agreement to store ground water and pay the 2 for 1 Replacement water obligation by HDPP could ultimately be one of the best things to happen for the VVWD, the mere storing of water for HDPP at the expense of other producers in the Basin, defeats the policies of the adjudication or treating everyone in equity, especially those Farmers along the Flood Plain Aquifer, who have only recently begun to understand that the Flood Plain Aquifer is the only area where Natures Free Water is stored. The VVWD wells are in the Regional Aquifer and do NOT receive annual recharge from the FloodPlain Aquifer.

Perhaps each of the Board members should reconsider what is before the California Supreme Court.

> "By 1990 the cumulative overdraft on the Basin exceeded one million acre feet. If the situation is allowed to go unchecked, **the result will be ground subsidence, decreased water quality, increased costs to pump from constantly increasing depths, destruction of the underground storage capacity, and, ultimately, complete exhaustion of the underground supply**." [bolding and underlining added by Ledford for emphasis]
>
> Clearly the City of Victorville and the Victor Valley Water District concurred with this analysis as can be seen by their signature on the Brief

**Thomas P. Mc Guire for the City of Victorville and Victor Valley Water District**

The adjudication was started to determine vested water rights to "Natures Free Production", which the parties were advised was recharged into a common pool of the water. (Referred to in the adjudication as the TeaCup Theory). The "theory" was, since all producers in the common pool were equally responsible for the overdraft, so everyone was to share equally in the cure. New production on the other hand was required to pay the full price to bring in new water into the basin[s]. The Fourth Circuit Court stated it clearly, **" Equity dictates that all persons in the same position be treated alike." (Civ. Code, § 3511 [ "Where the reason is the same, the rule should be the same."].)** Farmers were promised that over a five-year period they would be paid handsomely for their **"Free Production Allowance".** They could make more money selling or leasing their water than they could farming. Yet five years after the adjudication went into effect, many farmers still cannot sell their water, or if they can it is at bargain basement prices.

> "The trial court Judgment is supposed to provide an equitable mechanism, a "Physical Solution," for allocating pumping rights and financing the purchase of imported water supplies essential to the ongoing enjoyment of all classifications of water rights in the Basin."

Within the past 90 days a long awaited study of the migrating water has been released by the USGS, at this writing the written report is still not available, but several public meetings have been held by the USGS. The result is that the vast majority of the municipal wells in the Alto Basin the where HDPP project is proposed, pump only ground water. There is no common pool. The Natural Recharge Water goes directly into the Main Stem of the Mojave River, in the Flood Plain Aquifer. That means that all of the natural water belongs only to the overlying producers, who enjoy this **"Free Production"** of nature's water. In order for a municipal producer to obtain a legal right to this water they must purchase the right. The Regional Aquifer is not naturally recharged.

In the case of the Victor Valley Water District, of the 33 wells they have only two that potentially are certain to be in the FloodPlain Aquifer, and both of them were drilled after 1990. CEC staff states that all **". . VVWD's water supply is entirely from groundwater."** Each and every year of production the Victor Valley Water District mines, all of their water from their wells. Each year the hydrographs indicate that their well levels go down.

The only way to cure the overdraft is by extensive recharge using imported State Water Project water..

## 1. Can the Energy Commission approve the use of State Water Project Water for "Cooling Towers" when the entire MWA entitlement will not cure the existing overdraft?

If High Desert Power Project were allowed to Purchase 4,000 Acre feet of SWP water for Cooling Towers with a 100% of consumptive use rate, the High Desert Power Project will have a negative environmental impact on the cumulative ability of the MWA to cure the overdraft and manage the water and water resources of the High Desert. Approval the project in an area of severe and chronic overdraft by a Water Agency that itself has failed to mitigate its overproduction of its well fields will only continue to exasperate the issue.

The overdraft began in the Basin in the mid 1950's. As a result of the overdraft, well levels and water quality declined significantly throughout the Basin. The safe yield of the Basin has been estimated as approximately 75,000 acre feet annually. In 1990, the safe yield was exceeded by approximately 63,000 acre feet. The trial court found that all water producers had contributed to the overdraft.

> "Overdraft" occurs if average annual consumptive use of water from a basin exceeds its safe yield plus any temporary water supply surplus. "Safe yield" is defined as the maximum quantity of water which can be withdrawn annually from a ground water supply under a given set of conditions without causing an undesirable result. The phrase "undesirable result" refers to a gradual lowering of the groundwater levels resulting eventually in depletion of the supply. *(San Fernando, supra, 14* **Cal.3d at** pp. 278-281.)

The existence of the overdraft has long been a matter of public knowledge. Bulletin 84 of the California Department of Water Resources, published in 1967, described in detail the nature and scope of the overdraft.

The existence of the overdraft has been acknowledged by every major hydrogeologic study of the area since the mid-1950s. If the overdraft is allowed to continue, it will result in a lowering of the groundwater table, increased pumping costs, decreased water quality, ground subsidence, damage to rare and endangered species, loss of native riparian habitat, and, ultimately, complete exhaustion of the water supply.

The dangers of overdraft have been recognized for many years in areas throughout California, as well as the need to address that problem in order to protect water rights and protect the public interest in the water supply.

Full importation of MWA's SWP entitlement of 75,800 acre feet of water would significantly lessen the amount of overdraft within the basin, however it is never anticipated that MWA will receive more than 70% of its total entitlement in any one year. Although the full 20% rampdown of the basin has been achieved, the MWA has failed to collect any money under the judgment to purchase supplemental water to recharge this chronically overdrafted basin. The VVWD, who proposes to supply water to this project, produces

only ground water. This means that the VVWD is mining water that is not naturally recharged Hydrographs demonstrate that VVWD well have continually gone down for a period of over 40 years.

In 1991, an Environmental Impact Report was prepared for the transition of George Air Force Base. That EIR identified substantial Environmental Impacts associated with the Development and Redevelopment of the Base and its surrounding property. MWA sued VVEDA and entered into a settlement agreement. That agreement states in part:

> Section 5. Water Issues: With respect to the water issues. . . the Parties hereby agree as follows:"
>
> "a. VVEDA shall comply with the California Environmental Quality Act ("CEQA"). . .and **shall evaluate each individual project to be undertaken** in connection with the implementation of the 1993 Redevelopment Plan and which may in any way impact upon water resources, **directly or indirectly**. For its growth inducing potential and its impact on local water resources. VVEDA shall not approve any project unless available water resources for the project are adequate to meet projected demand of the project."
>
> "b. To the extent permitted by law, VVEDA shall seek to become a party in the Mojave River Adjudication, Riverside Superior Court Case No. 208568, if it becomes a water purveyor and in such event agrees to be bound by any judgement which is entered including any physical solution is finally agreed upon by the Parties in settlement of the water adjudication litigation"

In December of 1992 MWA required additional comments be added to the EIR:

At page 94: " . . .Of the total operation storage capacity, approximately 881,000 acre-feet remains in storage, with the remainder have been previously extracted."

At page 100: "The City and/or the purveyor should participate in the annual cost to the Mojave Water Agency for the purchase and delivery of imported supplemental water to offset the increase to overdraft with will result from this project."

"Delivery of imported water can be accomplished through the oversized "reach one" of the Morango Basin Pipeline, which is currently under construction. Reach one will include a turnout allowing the discharge of up to **36,000 acre feet of water per year for recharge to the Upper Mojave River near the Rock Springs Road Crossing**"

It is abundantly clear that MWA intended that all water coming into the basin, was going to used for direct recharge and that VVEDA would be required to comply with the terms of the judgement.

In a sworn declaration before the Superior Court for approval of the Interlocutory Judgment Mr. Larry Rowe testified, that in San Bernardino Case No: 247481, Judge Kruge found and held in 1988 that:

> ". . the MWA could not contract away a portion of its State Project Water Entitlement to entities within the Mojave River Basin **until it addressed and solved** {emphasis added} regional water management concerns"

In a deposition taken on October 6, 1994, Mr. Caouette testified when asked if VVEDA would get a "Free Production Allowance" in the adjudication? He replied:

> "If VVEDA became a new producer and water purveyor, I don't think they would have a free production allowance. **They would all be new production subject to assessment**."

In the same deposition, when asked if the Victor Valley Water District had available water for new developments, including VVEDA, Mr. Caouette testified:

> "Once again, the terms of the judgment which would require them to purchase **replacement water**." Page 27 lines 14 - 15.

> "Water that would be available to them under the Stipulated Judgement through the purchase of **replacement water** above their free production allowance." Page 32 lines 2-5.

> "Any new development over the overdraft would be - - **would result in an increase to the overdraft**" page 64 lines 14 - 16.

In the same deposition when asked how will balance be achieved, Mr. Caouette testified:

> "Through the **replacement water** purchase". Page 118 lines 10 - 16

Replacement Water Assessments is described in the Judgement as follows:

> "Replacement Water Assessments shall be levied against each Producer on account of such Producer's Production, after any adjustment pursuant to Paragraph 24(q), in excess of such Producer's share of the Free Production Allowance in each subarea during the prior Year."

Paragraph 24(q) states:

> "If the Watermaster determines, using the Consumptive Use rates set forth in Exhibit "F", that a new Purpose of Use of any Producer's Production for any Year has resulted in a higher rate of Consumption that the rate

applicable to the original Purpose of Use of the Producer's Production in the Year for which Base Annual Production was determined, Watermaster shall use a multiplier (1) to adjust upward such production for the purpose of determining the Producer's Replacement Water Assessment and, (2) to adjust upward the Free Production Allowance portion of such Production for the purpose of determining the Producer's Make-up Water Assessment. The multiplier shall be determined by dividing the number of acre feet of Consumption that occurred under the new Purpose of Use by the number of acre feet of Consumption that would have occurred under the original purpose of use for the same Production." Page 33 - 34 of the Judgement

**2. If "Banking" were approved would HDPP have to Bank two acre feet of water for each acre foot to be consumed in the Cooling Towers, in order to equitably comply with the intent of the Physical Solution, wherein all "Producers" must buy Replacement Water on a two for one basis?**

While this issue could be the subject of many debates, the equitable principals of the adjudication are that every producer be treated alike. If the VVWD is allowed to take SWP water for an independent 100% consumptive use project, this in and of itself is precedent setting and would prevent the ability of the MWA to fulfill its obligations under the terms of the judgement. The argument that MWA is not purchasing its entitlement of water anyway and therefore someone else should be allowed to purchase it only flies in the face of the facts that to the MWA has not fulfilled its mandate. It was said clearly by the counsel for the City of Barstow. **"Water is a matter of money in California"**

The issue before the commission is essentially mute if the commission can determine that MWA cannot meet its obligations to cure the overdraft even using all of its entitlement water. On the other hand if the commission is required to determine if the "laws, rules and ordinances are being complied with, then this provision must be studied and addressed as a part of the environmental analysis.

## 3. Does the use of SWP Water for the 100% Consumptive use of water comply with the California Constitution Article X, Section 2, referring to Highest and Best Use?

*The California Constitution Mandates That Beneficial Uses Of Water Resources Be Maximized*!

The overriding policy of the State of California is to maximize the beneficial uses of its scarce water resources. This policy is expressed in Article X, Section 2, of the California Constitution, which states in pertinent part:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare...."

The fundamental issue of the overdrafted water basin has not been addressed. The MWA cannot supply water to HDPP except on an annual basis from surplus water after curing the overdraft. The MWA ACT, its adopted Water Management Plan prepared by the Bookman Engineering Firm and the Physical Solution of water rights mandates that the basins be brought into balance.

## RECOMMENDATIONS

1. Identify the actual "Project" to be considered by the various Boards.

2. Complete your own independent engineering studies for the proposed Project.

3. Conduct the appropriate CEQA Analysis.

4. Agree to the 2 for 1 Replacement water plan.

5. Require HDPP to treat and place in the Regional Aquifer 4,000 acre feet per year, every year.

6. During years when No State Project Water is available agree to supply up to 1/2 of the water in storage.

7. In the event that limit is reached the plant will have to shut down as your primary obligation is to serve the domestic water needs of your residential and commercial customers.

8. Do not enter into a one-sided contract that subjects the district to litigation for the next 80 years.